FOR ARGUMENT

Nos. 78-575, 78-597 and 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS
v.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The issue presented by this case is whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission refusing to investigate a proposed railroad rate increase under Section 15(8) of the Interstate Commerce Act (now codified as 49 U.S.C. 10707). The case may require the Court to consider whether such decisions are judicially reviewable, and, if so, when.

The Commission (petitioner in No. 78-597) argues that such decisions are never judicially reviewable. Respondents (Seaboard Allied Milling Corp., et al., and

Chicago Board of Trade, et al.) and *amici* (Potomac Electric Power Company, et al.) argue that such decisions are immediately reviewable. We have argued (contrary to the Commission) that such decisions are subject to judicial review but (contrary to respondents, *amici*, and the court of appeals) that the scheme of the Interstate Commerce Act and general principles of exhaustion of administrative remedies require that judicial review be deferred until the completion of a proceeding that any aggrieved shipper can compel the Commission to undertake under Section 13(1) of the Act (now 49 U.S.C. 11701(b)).

In this reply brief we attempt to identify the positions of the various parties (and the respects in which they do or do not disagree with our submission) and to respond to contentions not fully addressed in our opening brief.

1. *The Commission*

In support of its argument that decisions not to investigate proposed rates under Section 15(8) are not reviewable, the Commission argues that review would disrupt and delay the Commission's regulatory functions under the carefully structured procedures of the Act and would be contrary to the exhaustion doctrine, since shippers have an adequate administrative remedy under Section 13(1) (Br. 21-49). Those arguments, however, support only the proposition that judicial review should not be available until aggrieved persons have exhausted their administrative remedies under Section 13(1)—a proposition with which we agree (see U.S. Br. 14-19). They do not support the proposition that there should be no review even after shippers have exhausted their remedy under Section 13(1), and they do not respond to our basic contentions that review at that time (1) will not interfere with or delay the Commission's regulatory responsibilities and (2) may be necessary in some cases to ensure that the Commission

has not, for arbitrary or legally erroneous reasons, placed the burden of proof on shippers contrary to the statutory plan.

The Commission's only direct response to our contentions is that they envision a "conspicuously cumbersome procedure" (Br. 64 n.45).[1] The procedure we suggest, however, is no different from the procedure commonly used when a party believes that an interlocutory decision of a court or agency is in error. It may be "cumbersome" to carry on with a proceeding that the party believes to be infected with error; it is even more cumbersome to redo the proceeding if there is indeed an error. But the finality rule reflects the conclusion that administrative or judicial error is sufficiently infrequent that immediate review would produce many interruptions but few corrections of error. The procedure we suggest is essentially the one involved in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973).[2]

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[1]The Commission also incorrectly asserts (Br. 64 n.45) that our arguments are based on the assumption that the Commission is legally required to investigate a proposed rate increase if the rate is shown to be probably unlawful. Although that may be one factor reflecting on the Commission's proper exercise of its discretion, we have not contended that it is the only factor, or even a dispositive factor. As we explained in our brief (pages 33-34), we believe that the Commission properly can consider a number of factors, including the potential effect of the rate and its own limited resources.

[2]The Commission also has argued (Br. 42-43) that judicial review would interfere with the Commission's exclusive responsibility for determining the reasonableness of rates. The Commission's determination of the reasonableness rates, however, is not entirely immune from judicial review. Of course, only the Commission can determine the reasonableness of rates in the first instance. Moreover, the Commission's discretion in such determinations is broad, and courts may not substitute their judgment

2. *Southern Railway and Seaboard Coast Line Railroad*

The railroad petitioners have argued that review would be contrary to the doctrine of exhaustion of administrative remedies in view of the adequate remedy afforded to shippers by Section 13. Nothing in their briefs indicates that they disagree with our contention that review is available after a Section 13 proceeding, and the arguments of Southern Railway seem at least implicitly to accept our position.

3. *Seaboard Allied Milling Company*

In this Court, respondent Seaboard Allied relies entirely on the alleged violations of the long-haul-short-haul provisions of Section 4 of the Act as a basis for immediate jurisdiction in the court of appeals. It expresses no view on the availability or timing of review in cases where protestants allege violations of other provisions of the Act, but it contends that Section 4 warrants a special rule requiring immediate judicial review of the Commission's failure to investigate rates that are in "patent" violation of Section 4 (see, *e.g.*, Br. 13-16).

That position is untenable. First, Seaboard Allied's assertion that the rates are in "patent" violation of Section 4 is simply an allegation, not a statement of fact. The allegation was and is contested by the carriers (see A. 293; Southern Br. 7), and it was not endorsed by either the Commission or the court of

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for the Commission's. But once the Commission has made a final decision that rates are reasonable and lawful (or unreasonable and unlawful), that decision is reviewable under normal standards of review. See, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, *supra*, 412 U.S. at 806. Judicial review under the procedure we have suggested would require no different or greater intrusion into the Commission's reasonableness determinations than that routinely entailed by judicial review of final decisions on rates.

appeals (see A. 288, 315).[3] As petitioner Southern Railway aptly stated in response to this argument (Southern Reply Br. 9), the availability or timing of judicial review obviously cannot turn on "the shipper's enthusiasm for his position" or "whether an alleged violation is assertedly patent." See also *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978), and U.S. Br. 18 n.8.[4]

Second, there is no reason for concluding that alleged violations of Section 4 (patent or otherwise) present different considerations than other alleged statutory violations for purposes of determining the

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[3]Nowhere in its brief does Seaboard Allied identify any rates constituting such allegedly patent violations, by way of illustration or otherwise. As the Commission noted (A. 287), the record demonstrates that the few examples of alleged Section 4 violations cited by the protestants before the Commission were rebutted by tariff provisions and arguments filed by the carriers (see A. 160, 244, 272-273, 283, 293). Indeed, Seaboard Allied now admits (Br. 8 n.12) that the first example of an alleged Section 4 violation that it cited to the Commission was an error. We express no view on the merits of the other alleged Section 4 violations, but it is clear that respondents' allegations are not by themselves sufficient to make the violations "patent," "clear," or "uncontroverted."

[4]Seaboard Allied incorrectly relies (Br. 15, 37) on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), in support of its contention that agency action allegedly "contrary to or in excess of statutory powers" is always immediately reviewable. *Leedom* v. *Kyne* stands only for the well-established proposition that agency action in violation of a statute is reviewable when, as in that case, the decision is final and there is no further administrative remedy available. See *Briscoe* v. *Bell*, 432 U.S. 404, 413 n.13 (1977). See also, *e.g.*, 5 U.S.C. 704; *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). In contrast, when respondents in this case sought judicial review, they had an adequate administrative remedy in Section 13(1). *Leedom* v. *Kyne* did not suggest an exception to the exhaustion doctrine in cases in which the agency's action is alleged to be patently unlawful, or even is unlawful in fact. A principal purpose of the exhaustion doctrine is to give agencies an opportunity to correct their own errors and thus avoid unnecessary litigation.

availability or timing of judicial review. The Commission's failure to investigate Section 4 allegations was not a determination of their merits, and shippers are as free to file a complaint under Section 13 and obtain an adjudication of those claims (and damages if the complaint is upheld) as they are to assert other statutory violations under Section 13.

Third, it is significant that Seaboard Allied (and the Board of Trade, see Br. 24-25) draw from their theory the conclusion that, if the Commission decides not to investigate a proposed change in rates, then a court not only can order an investigation but also should enjoin the change in the rates (Seaboard Allied Br. 33).[5] That conclusion, although perhaps a logical extension of its theory that immediate review is available if and only if a court agrees that a proposed rate is patently unlawful, is contrary to this Court's decisions establishing that courts have no power to suspend rates that the Commission has not suspended. See *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); U.S. Br. 22-24.

Seaboard Allied, as well as the Board of Trade and *amici*, further contend that a Section 13 proceeding is not as adequate a remedy for unlawful rates as a Section 15(8) investigation because it is costly, time consuming, and provides damages rather than refunds to a successful shipper (Seaboard Allied Br. 40-42; Bd. of Trade Br. 22-23; PEPCO Br. 34-38). None of those

[5]Seaboard Allied professes, however, to be satisfied with the "lesser course" adopted by the court, presumably because it did not cross-petition from the judgment. The Chicago Board of Trade goes somewhat further and asserts that the court below erred in failing to enjoin the rates and order refunds (Br. 25). Because the Chicago Board did not file a cross-petition, however, it cannot obtain an alteration of the judgment in its favor. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); R. Stern & E. Gressman, *Supreme Court Practice* 477-487 (5th ed. 1978).

contentions supports the contention that the Commission's decision is immediately reviewable.

In the first place, the fact that exhausting one's administrative remedies may require someone to spend some time, money and effort is plainly not a reason for permitting such review before such remedies are exhausted; if it were, there would be nothing left to the exhaustion doctrine. More important, however, the contention that immediate judicial review is a less costly and time-consuming alternative is simply incorrect. Indeed, it is contrary to the very premise of the exhaustion of administrative remedies doctrine, which is designed to prevent wasteful litigation of claims that may well be resolved more quickly and economically at the administrative level. This case is an excellent illustration of that principle. If respondents' allegations of illegality are as clear and patent as they say they are, it could reasonably be presumed that, if they had promptly presented them to the Commission in a Section 13 complaint, the Commission would have resolved them in respondents' favor long ago. Instead, however, respondents (and all of the other parties) have spent considerable time, effort and money litigating issues (the Commission's alleged abuse of discretion and the reviewability thereof) that have no direct bearing on the basic issue of the legality of the rates.[6]

[6]Thus, for example, if this Court holds that the Commission's decisions not to investigate are immediately reviewable and affirms the court of appeals' conclusion that the Commission should have conducted an investigation, the Commission will simply commence a proceeding in which it may or may not ultimately find the rates to have been unlawful. If the Court concludes that decisions not to investigate are immediately reviewable but that the Commission did not abuse its discretion, parties desiring a determination of the lawfulness of the rates must then file a Section 13 complaint, which they could have filed at any time.

There is also no basis for Seaboard Allied's assertion that Section 13(1) is an inadequate administrative remedy because it compensates shippers for their actual damages but does not require refunds to them of more than their actual damages. Under the procedure we have suggested, if it is ultimately held that the Commission abused its discretion in failing to initiate an investigation under Section 15(8) and that error was of decisional consequence, it may be appropriate for the Commission to order payment of refunds for the seven-month period authorized by Section 15(8). See U.S. Br. 20-22. Even if we are wrong in that respect, however, there is no basis for the argument that recovery of no more than an aggrieved party's actual damages is an inadequate administrative remedy.[7]

4. *The Chicago Board of Trade*

The Board of Trade's argument is similar to Seaboard Allied's, except that the Board of Trade does not rely on the allegedly "patent" violations of Section 4. Instead the Board of Trade argues that there should be a special rule of immediate judicial review where the rates are "obvious[ly]," "patent[ly]" or "plainly" discriminatory in violation of Sections 2 and 3(1) of the Act (see Br. 9-26). These assertions are based on the fact that the tariff increase did not apply to shipments on non-railroad owned cars. As with the Section 4 claims, these are simply allegations that are disputed by the carriers and have not been decided by the

[7]The related claim of Seaboard Allied (Br. 42) and the Board of Trade (Br. 22) that Section 13(1) cannot compensate shippers who have lost sales or been forced out of markets as the result of an unlawful rate increase going into effect may or may not be true (no authority is cited), but it is irrelevant to the issue in this case, because the refund remedy provided by Section 15(8)—*i.e.*, refunds of unlawful rates charged during the first seven months they have been in effect—does not compensate shippers who have lost sales or been forced out of markets during that period.

Commission or the court of appeals. What we have said with respect to Seaboard Allied's argument applies to this contention as well.

5. *Potomac Electric Power Company*

Amici PEPCO, et al. contend that there should always be immediate judicial review of the Commission's decisions denying protestants' requests to conduct an investigation under Section 15(8), essentially because the complaint remedies of Section 13 are assertedly inadequate. That argument has been fully addressed in what we have said here and in our opening brief.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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